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In The Supreme Court of the United States

JUAN CARLOS LOPEZ,

Petitioner,

v.

ALBERTO GONZALES,
ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole issue presented in this case is whether 8 C.F.R. § 245a.19 which governs the interview process for aliens who apply for legalization under 8 U.S.C. 1255a, violates due process under the Fifth Amendment of the United States Constitution. The regulation does not permit an alien to present his legalization application in an adversarial hearing. The alien's only option is to present the legalization application to the district director and file an appeal to the administrative unit. 8 C.F.R. § 245a.2(e).

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Appendix B - December 11, 2006, The Board of Immigration Appeals affirmed this decision.

Appendix C - September 13, 2007, the Fourth Circuit Court of Appeals denied the Petition for Review.

Appendix D - July 2, 2008, the Fourth Circuit Court of Appeals denied the Petition for Rehearing and Petition for Rehearing *En Banc*.

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Petitioner, Juan Lopez, respectfully request that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

After Mr. Lopez's application was denied, he was placed in removal proceedings. Mr. Lopez sought to adjust his status under the legalization program. On August 21, 2006, the Immigration Judge rendered an oral decision that the Court does not possess jurisdiction to hear the legalization application. [Appendix A].

The Board of Immigration Appeals affirmed this decision on December 11, 2006. [Appendix B].

Petitioners filed a timely petition for review of the Board's decision. On September 13, 2007, the Fourth Circuit Court of Appeals denied the Petition for Review. [Appendix C].

Petitioners filed a Petition for Rehearing and Rehearing En Banc. That petition was denied on July 2, 2008. [Appendix D].

GROUNDS FOR JURISDICTION

Mr. Lopez filed an application for legalization under 8 U.S.C. 1255a which was denied on March 4, 2006. The application was denied because Mr. Lopez did not respond to requested evidence. According to Mr. Lopez, he never received notice of the additional requested evidence. After Mr. Lopez's legalization application was denied, he was placed in removal proceedings with the issuance of a Notice to Appear on June 22, 2006. J.A. 102-104.

As a form of relief from removal, Mr. Lopez sought to adjust his status under the legalization program. 8 U.S.C. 1255a. Although 8 C.F.R. 245a.19 vests the district director with exclusive jurisdiction over legalization applications, Mr. Lopez argued that the Immigration Judge possesses jurisdiction to adjudicate the legalization application under a straightforward Mathews v. Eldridge analysis. J.A. 81-87. The Immigration Judge held that he does not possess jurisdiction to hear the legalization application. J.A. 22. The Board of Immigration Appeals (BIA) affirmed the Immigration Judge's decision. J.A. 2. Mr. Lopez petitioned the Fourth Circuit to review the BIA Order. In a brief unpublished opinion, the Fourth Circuit denied the petition.

The United States Court of Appeals for the Fourth Circuit took jurisdiction pursuant to 8 U.S.C. Section 1252(a)(2)(D). Under this section, Congress authorized Circuit Courts within the jurisdiction of the Immigration Court to "[r]eview . . . all questions of law and fact, including interpretation and application of constitutional and statutory

provisions, arising from any other action taken or proceeding brought to remove an alien from the United States . . " Id.

The United States Court of Appeals for the Fourth Circuit denied Petitioners' Petition for Review in a decision dated September 13, 2007. Petitioners filed a Petition for Rehearing and Rehearing En Banc on October 15, 2007 pursuant to Fed. R. App. P. 35(b). On July 8, 2008, the Fourth Circuit Court of Appeals denied the Petition for Rehearing and Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This petition for a writ of certiorari challenges the constitutionality of 8 C.F.R. § 245a.19, which governs the interview process for aliens who apply for legalization under 8 U.S.C. § 1255a.

STATEMENT OF THE CASE

Petitioners now seek review by this Court.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THIS COURT HAS ALREADY FOUND THE LEGALIZATION PROGRAM'S DENIAL PROCESS TO BE INADEQUATE UNDER THE FIFTH AMENDMENT

The legalization program is no stranger to federal litigation and constitutional challenges. Five years after Congress enacted the legalization program, the Supreme Court held that district courts possessed jurisdiction to review administrative appeals of denied legalization applications. McNary v. Haitian Refugee Center, Inc., et. al., 498 U.S. 479, 493 (1991)(holding that district courts possessed jurisdiction to review administrative appeals of denied legalization applications); Reno v. Catholic Social Services, Inc., et al, 509 U.S. 43, 67 (1993)(holding that district courts retained jurisdiction to decide whether any class members were not permitted to file an application for legalization.)

Although judicial intervention was required from almost the inception of the legalization program, no court has addressed the issue of whether aliens in removal proceedings have a Fifth Amendment right to an adversarial hearing.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT ERRED WHEN IT DETERMINED THAT IMMIGRATION JUDGES LACKED JURISDITION TO HEAR ADJUSTMENT OF STATUS APPLICATIONS UNDER THE LEGALIZATION PROGRAM

In enacting 8 U.S.C. Section 1255a, Congress set forth a comprehensive scheme to legalize aliens who reside in the United States unlawfully. As part of this comprehensive scheme, Congress said that the legalization application may either be filed with the "Attorney General or with the qualified designated entity, but only if the applicant consents

to forwarding the application to the Attorney General." 8 U.S.C. 1255a(c)(1)(A) and (B). If the legalization application is denied, "The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review . . " 8 U.S.C. 1255a(f)(3). Finally, an alien may seek judicial review in federal court only if the there is an order of deportation against the alien. 8 U.S.C. 1255a(f)(4).

Although the statute plainly states that the legalization application may be filed with the "Attorney General" and the Immigration Court is a designee of the Attorney General, the former Immigration and Naturalization Service (INS) promulgated regulations divesting the Immigration Court of authority to consider an application for legalization. Under the regulations, an alien may only file a legalization application with the district director or the designated entity. 8 C.F.R. 245a.2(e). Divesting the Immigration Courts of adjudicating legalization of aliens in removal proceedings violates basic principles of due process.

It is black letter law that tribunals must afford litigants a meaningful opportunity to be heard. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Landon v. Plasencia, 459 U.S. 21, 30 (1982). While aliens who initially seek admission to the United States are not granted constitutional rights regarding their application, "...once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." Plasencia at 29.

Even if an alien is statutorily classified as inadmissible, they are entitled to due process protections unavailable to those outside the United States borders. See Zadvydas v. Davis, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001)("once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); Wilson v. Zeithern, 265 F.Supp.2d 628, 633 (E.D. Pa 2003)(the statutory classification of ""inadmissible"...cannot displace due process analysis or perforce place him outside the reach of the Due Process Clause").

Mr. Lopez, who is physically in the United States and has been residing here for over 25 years should be protected by Fifth Amendment's due process clause and therefore must have an opportunity to present his legalization proceeding in an adversarial hearing.

Although the degree of protection may vary, "[w]hen Congress directs an agency to establish a procedure... it can be assumed that Congress intends that procedure to be a fair one." Selgeka v. Carroll 184 F.3d 337, 342 (citing Marincas v. Lewis, 92 F.3d 195, 201 (3rd Cir. 1996)).

In Selgeka, the Court of Appeals for the Fourth Circuit set forth the procedural safeguards available to aliens whose applications are adjudicated by an Immigration Judge versus the lack of process available to aliens who simply have a non adversarial hearing with the district office. First, unlike immigration officers who "[a]re employees of

the INS, immigration judges are independent of the INS." Selgeka v. Carroll, 184 F.3d 337, 345 (4th Cir. 1999).

Second, "unlike the informal, non adversarial interview conducted by an asylum officer, an asylum applicant at an exclusion or deportation hearing is entitled to many procedural rights. The immigration judge must inform the applicant that he has the right to counsel and that free legal services are available." Id. Third, "the applicant is also entitled to an official interpreter if the need arises." Id. Finally, the resulting lack of an evidentiary record hobbles judicial review. In light of the "substantial evidence" standard and "[t]he deficient procedure to which Selgeka was limited", the court found it was "unable to give the BIA decision the searching review it deserves." Selgeka at 345.

The same procedural shortfalls the Court found problematic in Selgeka are present in this case. Under the legalization regulations, the alien is not advised of his rights to an attorney, the United States Citizenship and Immigration Services (USCIS) does not provide the alien with interpreters, and USCIS does not maintain a transcript of the proceedings. This Court is similarly unable to review whether Mr. Lopez received an adequate and fair hearing in the legalization application.

This Court is also unable to review a meaningful record under the deferential substantial evidence standard. "With these process concerns in the forefront, to hold that an asylum applicant is entitled to a fair proceeding before an impartial judge is not a great leap of faith." Selgeka at 345. As

these procedural shortfalls are the same in Mr. Lopez's case, they are equally problematic in this case.

Of course for Mr. Lopez to challenge the legalization regulations, he must have a protected property interest. It is a longstanding canon of constitutional jurisprudence that the "[p]rocedural component of the Due Process Clause does not protect everything that may be described as a 'benefit.' 'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it.'" Town of Castle Rock v. Gonzales et. al., 545 U.S. 748, 756 (2005), citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

An entitlement to a benefit may be created by statute. Castle Rock at 756. There are two principal reasons in favor of recognizing a property interest in the legalization application. First, although not all statutory benefits merit due process protection, the withdrawal of a direct benefit -- such as a financial payment or legal right -- may trigger due process protection. See Id at 767-768.

In this case, legalization protects the alien from deportation and provides the opportunity to work legally. McNary v. Haitian Refugee Center, Inc. et al., 498 U.S. 479, 490-491. Mr. Lopez's interest in remaining in the United States and having his legalization application adjudicated by an Immigration Judge is a direct financial and legal benefit.

Second, if the government ultimately has discretion to grant or deny the benefit, the benefit does not give rise to a property interest. Id at 56. Congress divested the Attorney General of discretion to grant or deny an adjustment of status application under the legalization program. 8 U.S.C. 1255a states: "The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residency if the alien meets the following requirements. . ."

The "shall" language of 8 U.S.C. 1255a(a) divests the Attorney General from exercising his discretion in granting or denying the case. Thus, Congress created an entitlement to Mr. Lopez to apply for legalization. That entitlement is protected under the Due Process Clause. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). Therefore, as a property interest is created by the statute, the inquiry is how much process is available to Mr. Lopez. This inquiry is resolved by balancing the factors set forth in Mathews v. Eldrige, 424 U.S. 319 (1976).

CERTIORARI SHOULD BE GRANTED BECAUSE MR. LOPEZ POSSESSES A FIFTH AMENDMENT RIGHT TO AN ADVERSARIAL HEARING PURSUANT TO THE MATHEWS V. ELDRIDGE FACTORS

In Mathews v. Eldridge, this Court set forth three factors that must be weighed in order to determine whether the procedures provided to an individual comport with the Due Process Clause. Mathews v. Eldridge, 424 U.S. 319, 335-336 (1976).

Under Mathews v. Eldridge, this Court must weigh Mr. Lopez's private interest in remaining in the United States, the risk on an erroneous adjudication if Mr. Lopez's case is not heard by an Immigration Judge against the administrative cost to the government to providing Mr. Lopez a hearing with an Immigration Judge. Id. See also Landon v. Plasencia, 459 U.S. 21, 34 (1982), holding that the process available to immigrants is governed by the factors set forth in Mathews v. Eldridge.

In describing the importance of the benefit of legalization, the Supreme Court found that "[t]his status not only protects the alien from deportation; it also creates job opportunities that are not available to an alien whose application is denied. McNary v. Haitian Refugee Center, Inc., et. al., 498 U.S. 479, 493 (1991). In McNary, the plaintiffs alleged and the government did not dispute that legalization was an important benefit. Id. The benefit of legalization is "a measure of freedom to work and to live openly without fear of deportation or arrest..." Id. at 490-491.

The Court found the impact of a denial to obtain gainful employ sufficient to "mandate constitutional fair procedures in the application process." McNary at 490-491. Mr. Lopez's interest in remaining in the United States and being gainfully employed is the same as the those of the McNary petitioners. Indeed, having his legalization application adjudicated by an Immigration Judge is of the highest importance.

Given the importance of Mr. Lopez's interest in remaining in the United States, legalization

application must be decided in an adversarial hearing in front of an Immigration Judge. In an adversarial setting, the procedural shortfalls identified in Selgeka v. Reno would not longer be present. In an adversarial hearing, Mr. Lopez will be able to develop a complete and transcribed record of the proceedings. Mr. Lopez will be advised of his right to counsel and he will be provided with an interpreter. Selgeka at 345. In addition, in an adversarial hearing, Mr. Lopez will be able to cross examine adverse witnesses. In Goldberg v. Kelly, the Supreme Court stated: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly 397 U.S. 254, 269 (1970).

Discussing the importance of an adversarial hearing, the Goldberg v. Kelly Court held:
"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously.

We have formalized these protections in the requirements of confrontation and cross-

examination. They have ancient roots. They find expression in the Sixth Amendment. . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in the criminal cases . . . . but also all types of cases where administrative . .. actions were under scrutiny." Goldberg v. Kelly at 270, citing Greene v. McElroy, 360 U.S. 474, 496-497 (1963).

In this case, the legalization application was denied because the USCIS held that Mr. Lopez "abandoned" the application. J.A. 105. According to the USCIS, a request for additional evidence was sent to Mr. Lopez. J.A. 105. It is unclear if that request for additional evidence was ever sent or if Mr. Lopez even received the requested additional evidence. Once in removal proceedings, at a very minimum, due process requires for Mr. Lopez to be afforded to be heard on whether he received the requested evidence and whether he responded to the requested evidence.

Finally, granting Mr. Lopez an adversarial hearing does not create a burden on the government. The Office of the Immigration Judge was already created by statute. 8 U.S.C. 1229a(a)(1). The regulations authorize and the Immigration Judges routinely hear application for adjustment of status. 8 C.F.R. 245.2(a)(1). In fact, Mr. Lopez already appeared in front of an Immigration Judge. J.A. 33-[illegible]. Therefore, the administrative cost of proving Mr. Lopez with an adversarial forum to hear his legalization application is minimal at best.

In sum, a simple weighing of the Mathews v. Eldridge factors must compel this Court to grant

certiorari because the legalization regulations are constitutionally deficient. Mr. Lopez has an important interest in staying in the United States and not being deported. The forum available to Mr. Lopez is deficient at best. He cannot meaningfully present his case for legalization; there is no transcribed record of this case. Mr. Lopez was not advised of his right to counsel. Mr. Lopez could not challenge any adverse evidence submitted. Taking into account these two factors balancing them against the fact that Congress has created an Immigration Court and that Immigration Judges routinely hear adjustment of status cases, this Court must conclude that Mr. Lopez possesses a due process right to be heard in an adversarial hearing.

CONCLUSION

This matter presents a significant issue concerning the petitioner's due process rights under the fifth amendment. Wherefore, for the reasons articulated above, Petitioner Juan Lopez. requests this Court grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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